No. 79-432

DEC 8 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

EL CAMINO COMMUNITY COLLEGE DISTRICT AND STUART E. MARSEE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals is reported at 600 F. 2d 1258. The opinion of the district court is reported at 454 F. Supp. 825.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1979. A timely petition for rehearing was denied on August 9, 1979. The petition for a writ of certiorari was filed on September 15, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in investigating a possible violation of Title VI of the Civil Rights Act of 1964 by an educational institution, the Department of Health, Education, and Welfare may seek information about activities not directly supported by federal financial assistance in order to determine whether the institution's conduct of those activities impermissibly discriminates among existing or prospective beneficiaries of the programs that are funded by federal grants.

STATEMENT

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance. 42 U.S.C. 2000d *et seq.*; 45 C.F.R. 80.3. This dispute concerns the scope of the investigative authority of the Department of Health, Education, and Welfare (HEW) in determining whether a recipient of federal assistance is discriminating impermissibly against current or prospective participants in federally funded programs.

In 1973, HEW received a complaint that El Camino Community College was discriminating, in both its educational and employment practices, against Spanish-surnamed persons. HEW asked El Camino to provide information about the composition of its student body, recruitment and financial aid practices, and programs for the provision of academic assistance to students. It also requested information about hiring practices. El Camino acknowledged that it was a recipient of federal financial assistance within the meaning of Title VI, but refused to submit information about any programs and practices that were not themselves supported by federal funds.

After further unsuccessful attempts to obtain the requested information, HEW referred the matter to the Department of Justice for enforcement. 42 U.S.C. 2000d-1; 45 C.F.R. 80.8(a)(1). On December 12, 1977, the United States filed this suit in the United States District Court for the Central District of California. The government sought an injunction requiring El Camino to provide the information requested by HEW.

The district court held (Pet. App. 31a) that El Camino's refusal to provide the information violated Title VI, HEW's regulations implementing Title VI, and the Assurance of Compliance form (*id.* at 33a-34a) that El Camino signed as a precondition to receipt of federal funds. The court enjoined El Camino from continuing to refuse HEW access to the requested information. The district court rejected El Camino's claim that HEW's investigative authority extended only to information about programs themselves supported by federal funds. The court held that El Camino had contracted with HEW to permit broader access (*id.* at 23a-25a), and that, in any event, HEW had authority to determine whether discrimination in programs not supported by federal funds resulted in illegal discrimination against student beneficiaries of federal assistance (*id.* at 25a-28a).

The court of appeals affirmed (Pet. App. 7a-12a). The court ruled that El Camino had agreed to comply with HEW regulations authorizing the agency to review any records of the college bearing on practices that might have a discriminatory impact on the intended beneficiaries of federally funded programs (*id.* at 7a-10a). Without explicitly ruling on the validity of HEW's regulations under Title VI, a question not raised by petitioners in the district court (*id.* at 8a, 22a), the court stated that "[i]n exercising its investigatory powers, as

distinguished from its regulatory or remedial powers. HEW must have substantial latitude in scrutinizing policies and practices of the institution that may have a discriminatory impact on the intended beneficiaries of [federal] assistance" (*id.* at 10a).

ARGUMENT

The court of appeals has decided only that petitioners must comply with their contractual agreement to allow HEW access to records concerning practices of the college that may operate to discriminate against beneficiaries of federal financial assistance. The decision correctly recognizes that HEW's regulations and El Camino's Assurance of Compliance contemplate agency access to records of programs and activities that do not directly receive federal funding but that may be conducted in such a way as to produce a discriminatory effect within the federally funded program itself. This unremarkable proposition does not merit further review.

Notwithstanding the phrasing of petitioners' questions presented, the case in its current posture does not present any issue regarding the validity of HEW's regulations. Much less does it present any question concerning HEW's authority to withhold federal funds or to regulate unfunded activities at a recipient institution. The sole question decided by the lower courts involves HEW's authority to request information under its regulations and its contractual agreement with petitioners. The court of appeals' decision on this matter is correct and unexceptional. It does not conflict with the ruling of any other circuit and review by this Court is not warranted.

1. The Assurance of Compliance signed by El Camino as a precondition to receiving federal funds states specifically that "El Camino Junior College District * * *

HEREBY AGREES THAT it will comply with title VI * * * and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education, and Welfare (45 CFR Part 80)" (Pet. App. 33a). The regulations with which El Camino promised to comply require a fund recipient to give HEW "such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part." 45 C.F.R. 80.6(b).

45 C.F.R. 80.4(d)(2) states:

> (d) *Assurance from institutions.*
>
> (1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for special training project, for student loans or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.
>
> (2) The assurance required with respect to an institution of higher education, hospital, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, patients, or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the

> program of the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such program. * * *

45 C.F.R. 80.3(c)(3) states that "[w]here a primary objective of the Federal financial assistance is not to provide employment," but where discrimination in employment may tend to result in illegal discrimination against participants in the federally funded program, such employment discrimination is prohibited "to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries."

This Court has held that Congress has the authority to fix the terms under which it will grant federal funds and that the government has the power to enforce assurances for which it has contracted. *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940). The court of appeals' decision merely requires El Camino to live up to its contractual obligation.

2. Even absent the contractual assurances, the lower court's decision rests on firm ground. It is the statutory responsibility of HEW, as the agency providing financial assistance, to insure that the assistance is utilized in a manner free of prohibited discrimination. 42 U.S.C. 2000d-1. To carry out this responsibility, the court of appeals found, HEW must have the authority to investigate whether any policies or practices of a recipient have the prohibited effect on beneficiaries of federal assistance. See also *Caulfield* v. *Board of Education of the City of New York*, 583 F. 2d 605 (2d Cir. 1978); *Board of Public Instruction of Taylor County, Florida* v. *Finch*, 414 F. 2d 1068, 1078-1079 (5th Cir. 1969).

As the court of appeals noted, the narrow interpretation of HEW's investigative authority advanced by El Camino could prevent HEW from discovering general patterns of discrimination not aimed solely at federally assisted programs. The court offered the following example (Pet. App. 10a-11a):

> [I]f the institution received federal funds under the National Direct Student Loan Program and made these benefits available on an equal basis to all of its students, but the institution refused to admit Spanish surnamed students, potential beneficiaries of the federally funded program would have been denied benefits on the basis of their race [or national origin]. An investigation solely of the administration of the loan program would not reveal the violation.[1]

The lower court's opinion is consistent with decisions of this Court regarding the investigative authority of administrative agencies. Agencies with investigative authority, the Court has held, are entitled to obtain all evidence "not plainly incompetent or irrelevant to any

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[1]The record does not indicate which requested information petitioners believe is related solely to programs not receiving federal financial assistance. Petitioners' apparent desire is that HEW's investigative authority not reach activities not paid for with federal money. Without a thorough investigation, however, it is not always possible to determine which practices are part of a program that receives federal assistance. For example, where assistance is provided to students enrolled in the school, admissions practices may be considered part of the program that is federally assisted. For purposes of this case, however, the precise scope of the "program or activity receiving federal financial assistance" need not be determined, because the key regulation at issue, 45 C.F.R. 80.4(d)(2), does not make the agency's investigative authority directly dependent on that factor.

lawful purpose of the [agency] in the discharge of [its statutory] duties." *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943). See also *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950); *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). In sustaining HEW's request for access to El Camino's records, therefore, the court of appeals merely applied the accepted principle that the agency's power to investigate must be broader than its power to regulate in order to permit the agency to obtain all the information necessary to determine whether substantive violations have occurred. *Endicott Johnson*, *supra*, 317 U.S. at 508-509; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 198-201 (1946); *SEC* v. *Brigadoon Scotch Dist. Co.*, 480 F. 2d 1047 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974).

3. Contrary to petitioners' assertion (Pet. 11-13), the court of appeals' decision in this case does not conflict with decisions of other courts of appeals interpreting HEW's authority under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* Those cases involved an altogether different issue. The cases cited by petitioners did not concern the scope of HEW's investigative authority but addressed only the question whether HEW's regulatory authority under Title IX of the Education Amendments of 1972 allows the agency to issue regulations prohibiting sex discrimination in the employment practices of educational institutions receiving federal financial assistance. See *Islesboro School Committee* v. *Califano*, 593 F. 2d 424 (1st Cir.), cert. denied, No. 79-200 (Nov. 26, 1979); *Junior College District of St. Louis* v. *Califano*, 597 F. 2d 119 (8th Cir.), cert. denied, No. 79-201 (Nov. 26, 1979); and *Romeo Community Schools* v. *United States Department of Health, Education and Welfare*, 600 F. 2d 581

(6th Cir.), cert. denied, No. 79-442 (Nov. 26, 1979). All three cases held that Title IX does not authorize HEW to prohibit employment discrimination except where a primary objective of federal financial assistance is to provide employment. The decisions did not question, however, that discriminatory employment practices could be reached if they operated to discriminate illegally against beneficiaries of federally funded programs. The courts of appeals simply held that HEW had shown no "nexus" between the employment practices prohibited by the challenged Title IX regulations and the possible effects of those prohibited practices on the student beneficiaries of federally funded programs. See *Islesboro*, *supra*, 593 F. 2d at 430; *Junior College District of St. Louis*, *supra*, 597 F. 2d at 121; *Romeo Community Schools*, *supra*, 600 F. 2d at 585 (adopting the court of appeals' decision in *Islesboro*). None of the cases raised any question about whether HEW could properly request information about possible employment discrimination where that discrimination might have an effect on the beneficiaries of a federally funded program.[2]

4. Petitioners argue (Pet. 9-10) that the investigative efforts of HEW impose costly and time consuming burdens on the college and that therefore certiorari should be granted. The response to this contention is twofold. In the first place, El Camino's challenge to HEW's investigative request involved solely the scope of the agency's investigative authority, not the burden or cost an authorized investigation might impose. Second,

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[2]The court of appeals in the present case noted that, although HEW's regulations (45 C.F.R. 80.4(d)) specifically permit a recipient to show that practices about which information was requested could not affect federally funded programs, petitioners did not attempt to make such a showing (Pet. App. 10a).

and more important, the court of appeals correctly observed (Pet. App. 11a) that petitioners' claim of administrative burden "cannot excuse the College for its failure to comply with the regulations that it accepted in obtaining federal funding * * *." Review by this Court is not justified in order to help petitioners avoid their obligation to gather and produce adequate information in response to HEW's request.

El Camino also suggests (Pet. 7, 11) that this case involves a governmental assertion of power to "regulate" the college's educational practices. This allegation is baseless. HEW has taken no action to affect El Camino's federal funds; it has merely attempted to conduct an investigation to determine whether further proceedings are warranted. Any challenge to the scope of future action concerning El Camino's eligibility for continued funding must await such action. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 51 (1938). There is simply no issue of regulatory authority now before this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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